TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-16-00603-CV

Mike Morath, in his official capacity as Commissioner of the Texas Education Agency, Appellant

v.

Virginia Diane Lewis, Individually and as Next Friend to C. J. L.; Jennifer Ruth Rumsey, Individually and as Next Friend to K. L. O.; Jennifer Taylor, Individually and as Next Friend to C. M. T.; Terri Renae Henson, Individually and as Next Friend to A. K. H.; Nicole Rechner, Individually and as Next Friend to D. F. and T. M.; and Ashley Withers Gagnon, Individually and as Next Friend to A. C. G., Appellees

FROM THE DISTRICT COURT OF TRAVIS COUNTY, 98TH JUDICIAL DISTRICT NO. D-1-GN-16-002211, HONORABLE STEPHEN YELENOSKY, JUDGE PRESIDING

M E M O R A N D U M O P I N I O N

This is an interlocutory appeal from an order denying the plea to the jurisdiction of appellant, Mike Morath, in his official capacity as Commissioner of the Texas Education Agency (TEA), in a case challenging his administration of the 2015–2016 STAAR assessments. We will affirm the order.

Background

Chapter 39 of the Texas Education Code requires the creation and implementation of a statewide assessment program to measure Texas public-school students' mastery of state-mandated curriculum standards. *See generally* Tex. Educ. Code §§ 39.021–.39. To that end,

subsection 39.023(a) of this chapter directs TEA to "adopt or develop appropriate criterion-referenced assessment instruments designed to assess essential knowledge and skills in reading, writing, mathematics, social studies, and science" to be used in the State's student-assessment program. *Id.* § 39.023(a). Specifically, section 39.023 requires that TEA design assessment instruments that test students' knowledge and skills in reading and math at grades three through eight, writing at grades four and seven, science at grades five and eight, and social studies at grade eight. *See id.* § 39.023(a)(1)–(5). TEA must also adopt end-of-course assessments for English I and II, Algebra I, biology, and U.S. history. *Id.* § 39.023(e). Since 2012, TEA has used the State of Texas Assessments of Academic Readiness (STAAR) to fulfil these statutory directives. *See Morath v. Texas Taxpayer & Student Fairness Coal.*, 490 S.W.3d 826, 835 (Tex. 2016).

In 2015, the Legislature amended section 39.023 by adding directives, applicable to the 2015–2016 school year, regarding the STAAR exams' validity, reliability, and duration:

> (a-11) Before an assessment instrument adopted or developed under Subsection (a) may be administered under that subsection, the assessment instrument must, on the basis of empirical evidence, be determined to be valid and reliable by an entity that is independent of the agency and of any other entity that developed the assessment instrument.
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> (a-12) An assessment instrument adopted or developed under Subsection (a) must be designed so that:
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> (1) if administered to students in grades three through five, 85 percent of students will be able to complete the assessment instrument within 120 minutes; and
> (2) if administered to students in grades six through eight, 85 percent of students will be able to complete the assessment instrument within 180 minutes.

Act of May 31, 2015, 84th Leg., R.S., ch. 1006, §§ 1, 5, 2015 Tex. Gen. Laws 3554, 3554–55 (codified at Tex. Educ. Code § 39.023(a-11), (a-12)).

In a post-session legislative briefing document analyzing these additions to section 39.023, TEA acknowledged that it needed to revise the STAAR exams as a result of the 2015 amendments to section 39.023, but explained that it would not be able to design, in time for the 2015–2016 school year, shortened exams that met the subsection (a-12) duration limits:

> **Action required for 2015–16 School Year**: . . . . The grades 3–5 reading and mathematics assessments must be revised and standards reset to meet the time requirements of subsection (a-12). The grades 6–8 reading and mathematics assessment standards will also need to be reviewed because those reporting scales are vertically linked to the grades 3–5 performance standards.
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> . . . .
>
> **Outstanding Issues:** . . . . The grades 3–5 assessments in reading and mathematics cannot be revised in time for the spring 2016 administration. The first administration of the shortened assessments would occur in spring 2017. . . .

Texas Education Agency, *Briefing Book on Public Education Legislation* 82–83 (July 2015). TEA did, however, remove five to eight questions[1] from each test, which reduced the length of the tests by approximately 13% to 16%. It is not clear from the record what effect these changes had on the duration of the administered tests, but appellees allege, and Morath does not dispute, that the elimination of five to eight questions per test did not bring the tests within the shortened time periods prescribed by the Legislature.

[1] Specifically, TEA eliminated the embedded field-test questions, i.e, newly developed exam questions that are included on student assessments for the purposes of gathering data, but that do not count toward a student's score.

After administering the 2015–2016 STAAR exams to students, TEA experienced "ongoing reporting issues with [the] testing vendor." As a result of these issues, TEA notified school districts that it was "removing student consequences attached to STAAR testing for grades 5 and 8 for the remainder of the 2015–16 assessment cycle." TEA also encouraged school districts to "use local discretion to determine on an individual basis whether accelerated instruction should be offered in the applicable subject area." *See* Tex. Educ. Code § 28.0211(a-1)–(f) (requiring "accelerated instruction" for fifth- and eighth-grade students who fail to perform satisfactorily on STAAR reading and mathematics grade assessments). The TEA also notified the districts that they "should use local discretion and all relevant and available academic information to make promotion/retention decisions for these students as [the districts] see fit," including, for example, "the recommendation of the teacher and the student's grade in each subject." *See id.* § 28.0211(a) (conditioning promotion on satisfactory performance on STAAR reading and mathematics exams), (e) (requiring retention of students who fail assessments at least three times).

Appellees—the parents of third-, fifth-, and eighth-grade students who did not perform satisfactorily on all or part of the 2015–2016 STAAR exams—sued Morath, in his official capacity as TEA's commissioner, for declaratory and injunctive relief related to TEA's administration of the spring 2016 STAAR assessments. According to appellees, Morath acted outside his statutory authority—i.e., acted ultra vires—by adopting and administering STAAR exams that did not comply with subsection (a-12)'s limits on tests' duration. Appellees alleged they were harmed by Morath's ultra vires acts because results from the non-compliant tests are used to determine a school district's or campus's accountability rating, to make retention and promotion

decisions,[2] and to label students as at risk for dropping out, *see id.* § 29.081(d), and thus subject to accelerated instruction. As relief, appellees requested declarations that the 2015–2016 STAAR exams did not comply with subsection (a-12)'s time constraints; that Morath acted outside his statutory authority in developing, adopting, and administering tests that did not comply with subsection (a-12); and that the non-compliant exams were not valid "assessment instruments" under the Education Code. Appellees also requested injunctive relief prohibiting TEA from using the results of the 2015–2016 STAAR assessments and ordering TEA to destroy all score results from those same exams.

Morath challenged appellees' claims in a plea to the jurisdiction, arguing that the ultra vires claim was not viable and, in the alternative, that appellees lacked standing to bring the ultra vires claim. The district court issued an order denying Morath's plea to the jurisdiction, and Morath appeals, raising as issues the same grounds for his plea to the jurisdiction.

Discussion

Standard of review

Because subject-matter jurisdiction is a question of law, we review de novo a trial court's ultimate ruling on a plea to the jurisdiction. *See, e.g.*, *Houston Belt & Term. Ry. Co. v. City of Hous.*, 487 S.W.3d 154, 160 (Tex. 2016). Appellees had the burden in the first instance to plead or present evidence of facts that would affirmatively demonstrate the district court's

[2] Appellees' children were all promoted based on, appellees assert, Morath's consequences waiver. One child was required to attend a grade-placement committee meeting based on the student's STAAR results.

jurisdiction to decide their claims. *See, e.g.*, *Texas Parks & Wildlife Dep't v. Miranda*, 133 S.W.3d 217, 226 (Tex. 2004). We construe their pleadings liberally in favor of jurisdiction, taking their factual allegations as true except to the extent negated by evidence. *See, e.g.*, *id.* at 226–27. Here, although the jurisdictional facts overlap with the merits, no material facts are disputed by the parties. As such, we are presented solely with questions of law on the jurisdictional issues. *See id.*, 133 S.W.3d at 227 (holding that where relevant evidence is undisputed or fails to raise fact question on jurisdictional issue, court rules on jurisdiction as matter of law).

Viability of appellees' ultra vires claims

Appellees pleaded that Morath acted outside his legal authority—i.e., acted ultra vires—when he administered 2015–2016 STAAR assessments that did not comply with section 39.023(a-12)'s timing restrictions. *See, e.g.*, *Houston Belt*, 487 S.W.3d at 161 (explaining that government officer acts ultra vires when he "act[s] without legal authority or fail[s] to perform a purely ministerial act"). Morath, who does not dispute appellees' factual assertions regarding his acts—i.e., that TEA administered STAAR assessments in the spring of 2016 that did not meet the time restrictions of subsection (a-12)—contends that appellees have nevertheless failed to assert a viable ultra vires claim, and thus are barred by sovereign immunity, because the plain language of subsection (a-12) did not require that TEA adopt or develop new STAAR assessments for the 2015–2016 school year and that, even if it did, Morath complied with the requirement by "significantly shorten[ing]" the existing assessment instruments.

In making this argument, Morath emphasizes the following textual differences between the two parts of the 2015 legislative amendment to the Education Code:

(a-11) *Before* an assessment instrument adopted or developed under Subsection (a) *may be administered* under that subsection, the assessment instrument must . . . be determined to be valid and reliable . . . .

(a-12) An assessment instrument adopted or developed under Subsection (a) must be *designed* so that: . . . [students are able to complete the tests within certain time limits].

Tex. Educ. Code § 39.023(a-11)–(a-12) (emphases added). According to Morath, because the Legislature specified that (a-11)'s reliability and validity determinations must be made "[b]efore an assessment instrument . . . may be administered," but did not include a similar specification for (a-12)'s time limits, he was authorized to administer 2015–2016 STAAR assessments that did not comply with (a-12). Morath asserts that if the Legislature had intended for the (a-12) timing standards to be incorporated before the 2015–2016 tests were administered, it would have included the phrase, or some version of the phrase, "before an assessment instrument may be administered," as it did in subsection (a-11). We disagree, as such wording is unnecessary given the plain language of (a-12): it is not possible to "design" a test "adopted or developed under" section 39.023(a) *after* that test has been administered to students. Stated differently, a test has to exist—i.e., has to be designed, *see American Heritage Dictionary of the English Language* 491 (5th ed. 2011) (defining "design" as "to create or contrive for a particular purpose or effect")—before it can be administered. In contrast, an evaluation of an assessment's validity and reliability could be performed either before or after such a test has been administered to students. As such, the fact that (a-12) does not include some form of the phrase "before an assessment instrument may be administered" is not determinative.

Morath argues that even if appellees' interpretation of subsection (a-12) is correct and he was required to design the tests so that they could be completed within the specified time periods, he did shorten the tests by removing the field questions. And, Morath asserts, "[w]hether [he] was wrong to believe that those modifications would ultimately shorten the tests enough to meet the [(a-12)] time requirement[s], simply cannot be the basis of an *ultra vires* violation." But Morath's removal of the field-test questions and the results of that decision are not the basis of appellees' ultra vires claims. Rather, appellees claim that Morath "acted outside his statutory authority by adopting and utilizing assessments . . . that were not in compliance with" section 39.023(a-12). Under the enabling legislation and the plain language of subsection (a-12), the 2015–2016 STAAR exams were "assessments adopted or developed under" section 39.023(a) and, as such, had to "be designed so that" the exams could be completed within the specified time limits. *See* Tex. Educ. Code § 39.023(a-12). And while that provision may grant discretion regarding how the specified test-duration limits are to be met, it does not grant the discretion to ignore those limits. *See Houston Belt*, 487 S.W.3d 168–69 (government official's authority to make determination was limited by specifications outlined in ordinance at issue). Here, appellees's pleadings affirmatively allege that Morath acted outside his statutory authority by adopting, developing, and administering assessments that undisputedly were not "design[ed]" to be completed within (a-12)'s time limits. Accordingly, appellees have alleged a viable ultra vires claim. *See id.* at 169; *see also Miranda*, 133 S.W.3d at 226–27 (explaining that we must construe pleadings liberally in favor of jurisdiction, taking factual allegations as true except to the extent negated by evidence).

Morath also contends that appellees' ultra vires claim against him is not viable because the claim "is retrospective in nature." In making this argument, Morath references and relies on cases explaining that ultra vires claimants are limited to seeking prospective relief because retrospective relief is generally barred by immunity. *See, e.g.*, *City of El Paso v. Heinrich*, 284 S.W.3d 366, 376 (Tex. 2009) (holding that claimant who successfully proves ultra vires claim is limited to prospective injunctive relief); *Texas Educ. Agency v. American Youthworks, Inc.*, 496 S.W.3d 244, 265–66 (Tex. App.—Austin 2016, pet. granted) (holding that claimant's ultra vires claims were "barred by sovereign immunity because they seek or would require forms of relief that are retrospective in nature and, thus, impermissible") (citing *Heinrich*, 284 S.W.3d at 376). Morath suggests that granting appellees' requested relief would somehow require undoing past administrative decisions, but this does not accurately reflect the nature of appellees' requested relief. In their live pleadings to the district court, appellees ask for—in addition to related declarations—prospective injunctive relief enjoining TEA from using the 2015–2016 test results to retain a student, label a student's performance on the test as unsatisfactory, require a student's participation in accelerated instruction, label a student as "at risk," affect school's or district's accountability or performance ratings, or expend funds for accelerated instruction. They also ask for prospective injunctive relief enjoining TEA from administering tests that do not comply with 39.023(a-12) and from publishing score reports from the 2015–2016 exam. Or as appellees characterize it, they seek relief limiting the future uses of the results of the 2015–2016 STAAR assessments and preventing TEA from administering non-compliant tests. This type of prospective relief is appropriate for ultra vires claims. *See Heinrich*, 284 S.W.3d at 376.

We overrule Morath's first issue.

Standing

In his second issue, Morath asserts that the trial court lacks subject-matter jurisdiction because appellees lack standing to assert their claims. We disagree.

The standing doctrine identifies suits appropriate for judicial resolution. *Patel v. Texas Dep't of Licensing & Regulation*, 469 S.W.3d 69, 77 (Tex. 2015) (citing *Brown v. Todd*, 53 S.W.3d 297, 305 (Tex. 2001)). Standing assures there is a real controversy between the parties that will be determined by the judicial declaration sought. *Id.* As noted, appellees' complaint is that Morath adopted, developed, and administered a statewide assessment that did not comply with section 39.023(a-12)'s time restrictions. The alleged injuries from these ultra vires acts are that appellees' students are or will be subject to various repercussions based on the results of tests that did not comply with subsection (a-12), including the lowering of a school district's or campus's accountability rating, students potentially being retained in a grade, and labeling a student as "at risk for dropping out," thus subjecting those students to accelerated instruction. Appellees seek injunctive relief prohibiting Morath and TEA from using the results of the non-compliant tests.

Morath complains initially that appellees have failed to identify any injuries caused by the *duration* of the 2015–2016 STAAR exams. *See id.* (requiring "causal connection between injury and conduct complained of"). But here the complained-of conduct is not the duration of the tests, it is that the tests do not comply with Texas law—specifically, that Morath adopted and administered tests that do not comply with the time limitations the Legislature set forth in section

39.023(a-12). Further, appellees have alleged injuries caused by that conduct—e.g., being subject to various harmful repercussions based on results from the non-compliant tests.

Morath also contends that appellees cannot show actual injury attributable to his actions because he removed all "student consequences attached to STAAR testing for grades 5 and 8 for the remainder of the 2015–16 assessment cycle." Relatedly, he argues that the injuries they have alleged are not traceable to him because of his removal of student consequences and his direction to local districts to use their discretion in making decisions regarding accelerated instruction and grade retention. Appellees, in turn, assert that because Morath did not prohibit the use of the test results in other contexts, appellees' children have suffered consequences from the administration of the non-compliant tests. Specifically, appellees allege in their pleadings that because their children did not "perform satisfactorily" on the non-compliant 2015–2016 STAAR assessment, their children are considered "at risk for dropping out of school" under the Education Code. *See* Tex. Educ. Code § 29.081(d)(3) (defining "student at risk of dropping out of school" as including student who "did not perform satisfactorily on an assessment"). That designation, appellees continue, has resulted in their children being subject to required attendance outside of regular school hours, forced loss of electives, forced test preparation courses, pull-out instruction, and the social stigma attached such a designation. And, appellees emphasize, these alleged injuries would be redressed by their requested injunctive relief prohibiting the use of the exam results for any of these purposes. *See Heckman v. Williamson Cty.*, 369 S.W.3d 137, 155 (Tex. 2012) (standing requires that plaintiff's alleged injury be "likely to be redressed by the requested relief").

Finally, Morath contends that appellees' alleged injuries are speculative because they are based on the possible injuries resulting from a student being designated as at risk and from the possible injury of having a school's or district's accountability rating decreased. We disagree. Appellees have alleged, and Morath does not dispute, that their students have been designated as "at risk" under the Education Code and that certain of those students have already been subject to, or are imminently subject to, the consequences of a such a label, including, for example, being subject to accelerated instruction. Further, appellees have alleged in their pleadings, and Morath does not dispute, that at least one of the schools attended by appellees' students has had its accountability rating lowered based on the result of the non-compliant tests. To that extent, appellees have alleged injuries sufficient to establish standing. *See id.*; *see also Miranda*, 133 S.W.3d at 226–27 (explaining that we must construe pleadings liberally in favor of jurisdiction, taking factual allegations as true except to the extent negated by evidence).

We overrule Morath's second issue.

Conclusion

Having overruled Morath's issues, we affirm the district court's order.

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Jeff Rose, Chief Justice

Before Chief Justice Rose, Justices Goodwin and Bourland

Affirmed

Filed: March 29, 2018